No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DARYL L. JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
Counsel of Record
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case presents an important and frequently litigated question: whether a relator in a *qui tam* False Claims Act suit may lengthen the limitations period by invoking 31 U.S.C. § 3731(b)(2)—which runs from the date when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even though the United States has declined to intervene. The Eleventh Circuit's decision imposes significant burdens on the Chamber's members and other False Claims Act defendants. It allows relators to bring very stale suits, based on events up to a decade old, even when they knew of the alleged violation many years earlier.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice ten days prior to the due date of the Chamber's intention to file this brief. All parties have consented to the filing of the brief.

SUMMARY OF ARGUMENT

Every year, *qui tam* relators file hundreds of False Claims Act complaints. The United States intervenes in only about 25% of those cases, leaving the vast majority to be litigated by private plaintiffs. *See* Pet. App. 9a n.4; U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://www.justice.gov/opa/press-release/file/1020126/download. The question presented here—whether a relator may invoke 31 U.S.C. § 3731(b)(2) to lengthen the limitations period to as much as 10 years—is a critical threshold question in many of those hundreds of declined cases each year.

Section 3731(b) provides:

> A civil action under section 3730 may not be brought—
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> >
> > (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

As the Eleventh Circuit acknowledged, its interpretation of that statute creates a three-way split among the courts of appeals. It is undisputed that the complaint in this case was not timely filed under sub-

section 3731(b)(1)'s six-year limitations period. Thus, if the relator in this case, Mr. Hunt, had brought suit in the Fourth or Tenth Circuit, his complaint would have been time-barred. In those circuits, a *qui tam* relator may not invoke the limitations period in subsection 3731(b)(2) when the United States has declined to intervene. If, on the other hand, Mr. Hunt had filed suit in the Ninth Circuit, his suit would have been time-barred, for different reasons. In the Ninth Circuit, a relator may rely on subsection 3731(b)(2) in a declined case, but the relator is deemed to be "the official of the United States charged with responsibility to act." Because Mr. Hunt filed his complaint more than six years after the alleged violation and more than three years after he learned of facts material to his claims, his suit would have been dismissed in the Ninth Circuit.

Nonetheless, the Eleventh Circuit decided that the district court erred in dismissing Mr. Hunt's action as untimely because, in its view, a relator may rely on the limitations period in subsection 3731(b)(2), and also benefit from the government's later-in-time discovery of material facts as the starting point from which the limitations period runs. The Eleventh Circuit's decision is wrong. This Court has held that, although section 3731(b) states that it applies to "[a] civil action," that phrase should not be read to apply to all False Claims Act cases when doing so would result in "counterintuitive results." *Graham County Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415-422 (2005). Allowing relators to invoke subsection 3731(b)(2) in non-intervened cases leads to many of the kinds of counterintuitive results this Court warned against. The timeliness of a *relator's* suit would be determined by when the *government* learned of the basis for the relator's claims—allowing relators to de-

lay filing suit for years beyond the presumptive six-year limitations period, even when there is no good reason for doing so. The relator's limitations period could also start running even without his or her knowledge (*e.g.*, if the government received the relevant information without the relator's knowledge). In addition, the decision below renders subsection 3731(b)(1) insignificant and undermines the False Claims Act's intent to encourage the prompt filing of claims. Relators instead will have every reason to delay bringing their claims in the hope of claiming larger damages and penalties.

Finally, the Eleventh Circuit's interpretation of the False Claims Act imposes significant burdens on False Claims Act defendants. First, the three-way circuit split engenders uncertainty as the limitations period depends on the place of filing. Second, the Eleventh Circuit's decision is unfair to False Claims Act defendants, depriving them of the certainty and stability that statutes of limitations are designed to promote, and instead requiring them to defend against stale claims as much as ten years old. By prolonging False Claims Act litigation over stale claims, the court of appeals' decision increases litigation costs. Those costs, particularly when extensive discovery may be permitted, will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of the claims against them. Third, False Claims Act defendants would face difficult-to-challenge reputational harm, in addition to substantial financial risk, from old claims.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S DECISION CREATED A THREE-WAY CIRCUIT SPLIT

Before the Eleventh Circuit's decision, the courts of appeals were already divided over which statute of limitations governs a *qui tam* False Claims Act suit in which the government has declined to intervene. The Eleventh Circuit's decision added a third variant to the two positions other courts of appeals had adopted.

The Fourth and Tenth Circuits have held that a relator may not lengthen the six-year limitations period provided in 31 U.S.C. § 3731(b)(1) by invoking subsection 3731(b)(2).[2] *United States ex rel. Sanders* v. *North Am. Bus Indus., Inc.*, 546 F.3d 288, 293-296 (4th Cir. 2008); *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 722-726 (10th Cir. 2006). The Eleventh Circuit expressly disagreed with the Fourth and Tenth Circuits. Pet. App. 21a-22a; *see Sanders*, 546 F.3d at 293-294; *Sikkenga*, 472 F.3d at 723-725.

The decision below also broke with the interpretation of section 3731(b) adopted by the Ninth Circuit. Pet. App. 29a-31a; *see United States ex rel. Hyatt* v.

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[2] As petitioners note (at 15), the Fifth Circuit has adopted in unpublished decisions the same interpretation as that embraced by the Fourth and Tenth. *See United States ex rel. Jackson* v. *University of N. Tex.*, 673 F. App'x 384, 387 (5th Cir. 2016) (per curiam) ("In this circuit, however, *qui tam* FCA actions are governed by the limitations period found in § 3731(b)(1) when the government declines to intervene, as it did here."), *cert. denied*, 138 S. Ct. 59 (2017); *United States ex rel. Erskine* v. *Baker*, 2000 WL 554644, at *1 (5th Cir. Apr. 13, 2000) (per curiam) ("Because this action is not prosecuted by the United States or by its deputy, ... the Erskines cannot benefit from a tolling provision passed exclusively for the government's benefit.") (unpublished).

Northrop Corp., 91 F.3d 1211 (9th Cir. 1996). Like the Eleventh Circuit, the Ninth Circuit had determined that subsection 3731(b)(2) applies in non-intervened *qui tam* cases because, in its view, the statute makes "[n]o distinction" between a relator's suit and the government's suit. *Hyatt*, 91 F.3d at 1214, 1215 nn.5, 6. Unlike the Eleventh Circuit, however, the Ninth Circuit held that the limitations period under subsection 3731(b)(2) begins from the relator's, not the government's, knowledge. *Id.* at 1217-1218. In its view, the relator, in bringing a *qui tam* action, should be considered an "agent[] of the government" "'charged with responsibility to act' to enforce the False Claims Act" when the government declines to intervene. *Id.* at 1217 n.8, 1218 (quoting 31 U.S.C. § 3731(b)(2)).[3] The Eleventh Circuit criticized this reasoning as resting on "a new legal fiction," noting that "[n]othing in the statutory text or broader context suggests that the limitations period is triggered by the relator's knowledge." Pet. App. 30a.

This division among the courts of appeals will persist, if not deepen further, because the Eleventh Circuit's decision endorses different parts of the two approaches previously adopted by other circuits. Indeed, the three-way circuit split created by the decision below in effect embodies four distinct views about how to interpret the False Claims Act's statute of limitations: (i) only subsection 3731(b)(1) applies to non-intervened suits (Fourth and Tenth Circuits); (ii) both subsections 3731(b)(1) and (b)(2) apply to non-intervened suits (Ninth and Eleventh Circuits); (iii) "the official of the

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[3] The Third Circuit has applied the same approach in an unpublished decision in *United States ex rel. Malloy* v. *Telephonics Corp.*, 68 F. App'x 270, 273 (3d Cir. 2003). *See* Pet. 16-17.

United States" in subsection 3731(b)(2) refers to the relator in non-intervened actions (Ninth Circuit); and (iv) "the official of the United States" refers to an actual government official in those actions (Fourth, Tenth, and Eleventh Circuits). None of these views has clear majority support, thus worsening the confusion for the remaining courts of appeals and district courts.[4]

This is not a case where factual differences explain the divergent outcomes; nor is it an issue as to which the passage of time could harmonize the circuits' differing views. Only this Court's intervention can bring needed uniformity in the handling of this important threshold legal question regularly litigated in many of the hundreds of False Claims Act cases filed each year.

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[4] District court judges in circuits where the court of appeals has not addressed this issue have adopted a mix of views. Some have adopted the Ninth Circuit's approach. *See, e.g.*, *United States ex rel. Huddalla* v. *Walsh Constr. Co.*, 834 F. Supp. 2d 816, 824 (N.D. Ill. 2011); *cf. United States ex rel. Millin* v. *Krause*, 2018 WL 1885672, at *6 (D.S.D. Apr. 19, 2018) (applying a modified version of the Ninth Circuit's approach). Others have adopted the Eleventh Circuit's approach. *See, e.g.*, *United States ex rel. Wood* v. *Allergan, Inc.*, 246 F. Supp. 3d 772, 801-803 (S.D.N.Y. 2017), *rev'd on other grounds*, 899 F.3d 163 (2d Cir. 2018); *United States ex rel. Ven-A-Care* v. *Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 273-274 (D. Mass. 2009); *United States ex rel. Pogue* v. *Diabetes Treatment Ctrs. of Am.*, 474 F. Supp. 2d 75, 82-89 (D.D.C. 2007). And at least one district court has decided that subsection 3731(b)(2) applies to non-intervened suits, while declining to address the "further split" regarding whether "the official of the United States" refers to a government official or a relator. *See United States ex rel. Helfer* v. *Associated Anesthesiologists of Springfield, Ltd.*, 2014 WL 4198199, at *16-17 (C.D. Ill. Aug. 25, 2014) (unpublished).

II. THE DECISION BELOW IS WRONG

The Eleventh Circuit principally reasoned that section 3731(b)'s use of the phrase "civil action under section 3730" includes all types of False Claims Act cases: government-initiated, relator-initiated in which the government joins, and relator-initiated in which the government declines to intervene. In the Eleventh Circuit's view (and the Ninth Circuit's), "nothing in § 3731(b)(2) says that its limitations period is unavailable" in such suits. Pet. App. 14a. That is not so.

A. In *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409, 415-422 (2005), this Court held that the six-year statute of limitations in subsection 3731(b)(1) does *not* apply to a retaliation claim under the False Claims Act, even though subsection 3731(b)(1) applies to "a civil action under section 3730" and retaliation claims are authorized by section 3730(h). The Court emphasized that "[s]tatutory language has meaning only in context" and the context suggested that "a civil action under section 3730" was "ambiguous, rather than clear." *Id.* at 415. The Court resolved that ambiguity by excluding retaliation claims from "a civil action under section 3730." *Id.* at 422. That decision was guided both by the statutory context and by the interpretive canons that a statute should be construed to "avoid ... counterintuitive results" and that "Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Id.* at 415-422.

The Eleventh Circuit's decision contradicts *Graham County*. It treats the phrase "a civil action under section 3730" as clear even though *Graham County* explained that "Congress used the term 'action under sec-

tion 3730' imprecisely in § 3731," 545 U.S. at 418. And the statutory context is even clearer on the question presented in this case than it was on the question presented in *Graham County*. Subsection 3731(b)(2) refers to "the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2). As the Eleventh Circuit acknowledged, that phrase refers to a government official. Pet. App. 14a-22a, 29a-30a. This strong textual signal makes clear that Congress did not intend subsection 3731(b)(2) to be available in *qui tam* cases in which the government declines to intervene. *See Sanders*, 546 F.3d at 293-294 ("Section 3731(b)(2) refers only to the United States—and not to relators. Thus, Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party."); *see also Sikkenga*, 472 F.3d at 725 ("[W]e hold that § 3731(b)(2) was not intended to apply to private qui tam relators at all."). Reading "a civil action under section 3730" as applying to suits in which the government has chosen not to participate would therefore create just the sort of "textual anomaly" that *Graham County* identified as supporting a more limited construction. 545 U.S. at 416.

Legislative history confirms that "a civil action under section 3730" does not have the rigid meaning embraced by the Eleventh Circuit. Subsection 3731(b)(2) was added in 1986. Prior to that, the False Claims Act's limitations provision simply stated that "a civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). In support of adding subsection 3731(b)(2), the Assistant Attorney General for the Civil Division testified to a subcommittee of the House

Judiciary Committee that he had seen "requests to sue come in right on the brink of the statute of limitations, and sometimes beyond," which precluded the government from acting on fraud that "ha[d] been concealed, as it frequently is, from the Government." *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Govt'l Relations of the H. Comm. on the Judiciary*, 99th Cong. 159 (1986) ("*House Hearings*") (statement of Assistant Attorney General Willard). The "limited tolling period," he explained, would "give *us* a little more flexibility in bringing some cases that otherwise would be [time] barred." *Id.* (emphasis added).

Similarly, Senator Grassley—lead sponsor of the 1986 amendments—noted that, in determining whether "the Government had knowledge" for purposes of the limitations period, "care should be taken to assure that the information has reached an official in a position both to recognize the existence of a possible violation of this act and to take steps to address it." 132 Cong. Rec. 20,530, 20,536 (1986). Congress enacted subsection 3731(b)(2) to benefit the government specifically. *See also* S. Rep. No. 99-345, at 30 (1986) (statute of limitations under subsection 3731(b)(2) begins to run when "material facts are known by an official within the Department of Justice with the authority to act in the circumstances").

Thus, "a civil action under section 3730" should not be read to extend subsection 3731(b)(2) to actions in which the government has not intervened. Subsection 3731(b)(2)'s reference to an "official of the United States" makes "perfect sense" when the government is a party to the action, but "no sense whatsoever" where the relator is the sole party litigating the alleged fraud against the defendant. *Sanders*, 546 F.3d at 294. The

relator's limitations period would then be governed by a non-party's knowledge, which "does not notify the relator of anything." *Id.*; *cf. United States ex rel. Eisenstein* v. *City of New York*, 556 U.S. 928, 931-937 (2009) (the United States is not a party to False Claims Act actions in which it has not intervened).

The statute upon which subsection 3731(b)(2) was modeled further confirms that the longer limitations period applies only in cases in which the government intervenes. In drafting subsection 3731(b)(2), Congress looked to the general tolling provision in 28 U.S.C. § 2416(c). *Compare* 31 U.S.C. § 3731(b)(2) (action must be brought within three years of when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances") *with* 28 U.S.C. § 2416(c) (general statute of limitations excludes periods during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"); *see also* 132 Cong. Rec. at 20,536 ("The committee has added a tolling provision[] to the False Claims Act which is adopted directly from 28 U.S.C. § 2416(c)."). Subsection 2416(c) permits tolling *only* in actions brought by the government (and did so at the time Congress adopted subsection 3731(b)(2)). *See* 28 U.S.C. § 2416 ("Time for commencing actions brought by the United States—Exclusions"); Pet. App. 27a-28a. Subsection 3731(b)(2) should be so understood as well.

B. The Eleventh Circuit's decision gives rise to "counterintuitive results." *Graham County*, 545 U.S. at 415-421. This Court has "noted time and time again" that courts are "'obliged to give effect, if possible, to every word Congress used.'" *National Ass'n of Mfrs.*

v. *Department of Defense*, 138 S. Ct. 617, 632 (2018). Courts should not construe a statute in a way that would render a clause, sentence, or word "'superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001).

The Eleventh Circuit's interpretation of section 3731(b) renders subsection 3731(b)(1) "insignificant," even "if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). Subsection 3731(b)(1) would be operative only when the relevant official of the United States knew or should have known facts material to the claims within three years of the alleged violation, in which case the three-year limitations period under subsection 3731(b)(2) would expire before the six-year limitations period under subsection 3731(b)(1). If the government learned of the alleged violation between three and ten years after the event in question, subsection 3731(b)(1) would have no effect. Accordingly, the Eleventh Circuit's reading resigns subsection 3731(b)(1) to "quite an insignificant role," *Duncan*, 533 U.S. at 175—especially considering that subsection 3731(b)(2) was enacted because fraud was "frequently" concealed from the government until the then-existing six-year statute of limitations ran out, *see House Hearings* 159 (statement of Assistant Attorney General Willard). *Cf. New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 681 (2010) (rejecting a reading that "dramatically undercuts the significance" of another statutory provision).

As the Fourth and Tenth Circuits noted, relators' financial incentives will further contribute to the marginalization of subsection 3731(b)(1), effectively rendering it "superfluous." *Sanders*, 546 F.3d at 295; *see Sikkenga*, 472 F.3d at 726 (applying subsection 3731(b)(2) to non-intervened suits would "eviscerat[e]" subsection

3731(b)(1) "in the vast majority of cases"). Those circuits reasoned that relators have "a strong financial incentive to allow false claims to build up over time before they filed, thereby increasing their own potential recovery." *Sanders*, 546 F.3d at 295. Thus, relators would not opt to restrict their limitations period to six years under subsection 3731(b)(1); instead, they would take the full ten years allowed under the court of appeals' approach to subsection 3731(b)(2). *Id.*; *see also Sikkenga*, 472 F.3d at 726. Regardless of whether that is true in "nearly all False Claims cases," *Sanders*, 546 F.3d at 295, the Eleventh Circuit's reading certainly marginalizes the role of subsection 3731(b)(1) to the point of insignificance, particularly in light of the financial incentive for relators to wait before bringing their claims.

Extending subsection 3731(b)(2) to non-intervened suits would thereby undermine one of the purposes of the False Claims Act's *qui tam* provisions. Those provisions are intended "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot and will not"—in other words, "'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Sanders*, 546 F.3d at 295 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 547 (1943), *superseded by statute as stated in Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 412 (2011)); *see also Sikkenga*, 472 F.3d at 725. Even the Eleventh Circuit seemed to recognize the prompt combating of fraud as the overall goal of the False Claims Act, as evidenced by its discussion of the statutory incentives for prompt reporting. Pet. App. 23a-24a. Allowing relators to take advantage of subsection 3731(b)(2)'s longer limitations period in non-intervened suits undeniably interferes

with Congress's intent to "stimulate actions" to expose fraud. *Marcus*, 317 U.S. at 548; *see also Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) (statutory interpretation "'depends upon reading the whole statutory text, considering the purpose and context of the statute'").

III. Allowing Relators To Lengthen The Limitations Period Under Subsection 3731(b)(2) Imposes Significant Burdens On False Claims Act Defendants

The significant burdens imposed by the Eleventh Circuit's interpretation of the False Claims Act provide an additional reason to grant certiorari. The three-way circuit split itself engenders uncertainty and subjects False Claims Act defendants to different risks based simply on where a lawsuit is brought. Petitioners in this case, for example, would have been entitled to dismissal in the Fourth, Tenth, and Ninth Circuits. Pet. App. 3a-6a. Because the relator brought suit in the Eleventh Circuit, however, petitioners would need to engage in costly discovery to determine the "identity and knowledge of a government official," *Sanders*, 546 F.3d at 295, even though the official is not a party to the action and the alleged violations occurred more than seven years before the relator filed suit. Such starkly different results caused by dint of geography and nothing else undermine the certainty that statutes of limitations are designed to promote. *See Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14-15 (2014); *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

Allowing the longer limitations period in relator-only suits is also unfair to False Claims Act defendants. This Court has repeatedly emphasized that statutes of limitations "embody a 'policy of repose, designed to

protect defendants'" by fostering "'elimination of stale claims." *Lozano*, 572 U.S. at 14; *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims."). Businesses that provide services to the government, like all businesses, are entitled to the "'security and stability to human affairs'" that are "'vital to the welfare of society'" and should not be "'surprise[d] through the revival of claims that have been allowed to slumber.'" *Gabelli* v. *SEC*, 568 U.S. 442, 448-449 (2013). The Eleventh Circuit's decision undermines that fairness by requiring False Claims Act defendants to litigate claims over alleged violations that occurred long ago.

That uncertainty imposes real costs. For example, businesses in the Eleventh and Ninth Circuits may need to incur additional expenses *ex ante* to preserve certain evidence due to the longer limitations period available to relators in non-intervened suits—costs that are not necessary in the Fourth and Tenth Circuits. And businesses in jurisdictions that have yet to decide whether subsection 3731(b)(2) applies to relator-only suits will be left to wonder whether they should plan for any contingencies.

Even apart from document retention, memories fade, witnesses may become unavailable over time, and other sources of proof may be lost. For example, many people change employers within ten years and those who remain may well have difficulty remembering events from a decade ago. Ten years is a very long limitations period. Congress decided it was appropriate to permit the government to pursue actions within a reasonable amount of time after it learned of the relevant facts. But that provides no justification for allowing

relators to drag their feet for up to a decade, especially considering Congress's intent to ferret out potential misconduct by encouraging the prompt filing of claims.

More broadly, False Claims Act litigation is time-consuming and costly. False Claims Act actions touch on nearly every sector of the economy, including defense, education, banking, technology, and healthcare. They also frequently last a long time. As the Chamber has noted in another recently filed amicus brief before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. Chamber of Commerce of the United States of America et al. Amicus Br. 13, *Gilead Scis., Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). It is not surprising, then, that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

Discovery contributes to that financial burden. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1029-1030 (D.C. Cir. 2017). Moreover, the burden would be higher the longer a relator waited to file an action (as would be allowed under subsection 3731(b)(2)) because stale claims force "defendants and the courts ... to deal with cases in which the search for truth may be seriously impaired by the loss

of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. 111 at 117. *Cf.* Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-1265 (2008) ("most non-intervened suits exact a net cost on the public").

The Eleventh Circuit suggested that the discovery burden occasioned by its view of subsection 3731(b)(2) is overstated because the government's knowledge may be relevant to other defenses, such as showing that the defendant did not "'knowingly'" submit false claims or that the false statements were not "material" to the government's decision to pay. Pet. App. 22a-23a n.10 (citing 31 U.S.C. § 3729(a)(1) and *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)). But allowing relators to take advantage of the longer limitations period in non-intervened suits removes the threshold requirement that would have precluded any discovery on such issues in the first place. Those additional costs are undeniable.

The threat of discovery will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of a case. Only about 10% of non-intervened suits result in recovery, whether through settlement or final judgment, whereas 90% of the intervened actions lead to recovery. Pet. App. 11-12a. The difference in those rates cannot be explained solely by reference to the merits of the claims, *see* Pet. App. 12a n.6, but the correlations between the merits and the recovery rate cannot be ignored, either. If relators can lengthen their limitations periods under subsection 3731(b)(2) even when the government has not intervened, False Claims Act litigants are more likely

to settle those suits for fear of financial and reputational risk, even though the suits are frequently unmeritorious.

The cost of settlement in these circumstances can be enormous. The number of new *qui tam* False Claims Act matters has increased significantly, from 385 filed in 2006 to 674 in 2017. *See* U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 19, 2017), https://www.justice.gov/opa/press-release/file/1020126/download. By contrast, the number of government-initiated False Claims Act matters has remained relatively steady during this period, ranging from a low of 71 in 2006 to a high of 161 in 2008. (In 2017, there were 125.) *See id.* With the increase in *qui tam* actions, relators' recoveries have increased dramatically, including in non-intervened suits. In 2006, non-intervened actions resulted in roughly $22 million in recovery; in 2017, relators recovered approximately $425 million in non-intervened suits. *See id.*

The difficulties of dealing with stale claims reach beyond financial risk, as businesses may also suffer reputational hardship from simply having to defend a False Claims Act action. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices." Canni, *Who's Making False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 Pub. Cont. L.J. 1, 11 (2007). The reputational damages are worse if a relator's claims from long ago survive a motion to dismiss on limitations grounds. Such reputational risk, combined with financial harm, could lead some businesses to exit the government program altogether. *See* Memo. from Michael Granston, Dir., Commercial Litig. to Commercial Litig.

Branch, Fraud Sec. 5 (Jan. 10, 2018), https://drive.google.com/file/d/1PjNaQyopCs_KDWy8RL0QPAEIPTnv31ph/view ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry"); Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), https://www.law360.com/articles/924706/dod-buying-group-pushes-house-panel-for-rules-reform.

This Court's review is urgently needed to avoid all of these practical consequences of permitting stale claims, and to resolve the expanding circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DARYL L. JOSEFFER
MICHAEL B. SCHON
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JONATHAN G. CEDARBAUM
Counsel of Record
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
jonathan.cedarbaum@wilmerhale.com

OCTOBER 2018